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80-2206
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

SOPHIA T. STROM,
Petitioner,

VS.

THE UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court and Court of Appeals err in weighing the evidence and drawing inferences against petitioner contrary to Rule 56(e) of the Federal Rules of Civil Procedure.

2. Did the District Court err in holding that petitioner's claim was barred by the two-year statute of limitations when petitioner was under the exclusive care and treatment of the defendants until the time of the discovery of the alleged medical negligence.

3. Did the District Court and Court of Appeals err in granting defendants' Motion for Summary Judgment as a triable issue of fact was presented by petitioner as to the time of her discovery of defendants' negligent treatment?

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I

OPINION BELOW

This is an appeal from the Judgment entered on April 3, 1981, by the United States Court of Appeals for the Ninth Circuit affirming an Order of Dismissal by the Federal District Court for the Northern District of California, the Honorable Samuel Conti presiding.

The original appeal in this matter was from an Order of Dismissal entered on August 17, 1978, by the United States District Court for the Northern District of California.

The underlying action was brought by petitioner Sophia T. Strom against the United States of America, The United States Public Health Service Hospital and its employees, James Kauth, M.D., and Edward Falces, M.D., for medical malpractice in treatment received by petitioner on June 21, 1971, at the United States Public Health Service Hospital located in San Francisco, California.

The District Court's jurisdiction was invoked pursuant to 28 U.S.C. Section 1346(b).

The District Court's order of August 11, 1978 certified that it was the opinion that the claim by petitioner Sophia T. Strom was not filed within the two-year period after the claim accrued under Section 2401(b).

Petitioner filed a timely Notice of Appeal under 28 U.S.C. Section 1291. The case was argued on July 8, 1980, before the Ninth Circuit.

On April 3, 1981, the Court of Appeals for the Ninth Circuit rendered its Memorandum Opinion in this matter affirming the judgment of the trial court. The Court stated that it was its opinion that petitioner had enough information concerning the potential medical negligence of the defendants that as a matter of law her cause of action began to accrue from March, 1973, and that the filing of the Complaint on March 10, 1976, was beyond the two-year limitations period and, therefore, untimely. The Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix, infra (A. 1-7).

II

JURISDICTION

The jurisdiction of the Court rests on 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of the Supreme Court.

III

PROVISIONS INVOLVED

Rule 56(e), Federal Rules of Civil Procedure. 28 U.S.C. 2401(b).

IV

SUMMARY OF ARGUMENT

It is established law that in an action for medical negligence pursuant to the Federal Torts Claims Act, the claim accrues when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice. *Hungerford v. United States* (9th Cir. 1962) 307 Fed.2d 99; *Hanna v. United States Veterans' Administration Hospital* (3rd Cir. 1975) 514 Fed.2d 1092; *Sheets v. Burman* (5th Cir. 1963) 322 Fed.2d 277.

Rule 56 of the Federal Rules of Civil Procedure provides that a motion for summary judgment may be granted only if there is no triable issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure; *Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464; 7 Lawyers Edition, 2d, 458; 82 S.Ct. 486; *United States v. Diebold, Inc.* (1961) 369 U.S. 654; 8 Lawyers Edition, 2d, 176, 82 S.Ct. 993.

Further, it is established law that in ruling on a motion for summary judgment, it is improper for the judge to

weigh the evidence presented by affidavit: *United States v. Western Electric Company* (9th Cir. 1964) 409 F.2d 1377; *Hanna v. United States Veterans' Administration Hospital* (3rd Cir. 1975) 514 F.2d 1092; *Soria v. Oxnard School District Board of Trustees* (9th Cir. 1973) 488 F.2d 579. It is also established law that on a motion for summary judgment, the moving party's affidavits and moving papers are to be strictly construed and that if the court draws inferences from the evidence presented, it must be viewed in the light most favorable to the opposing party. *Goodman v. Mead, Johnson & Company* (3rd Cir. 1976) 534 F.2d 566; *United States v. Diebold, supra*; *Exnicious v. United States* (10th Cir. 1977) 563 F.2d 418.

From the outset, it is apparent that the Judge of the United States District Court not only weighed the evidence presented by the moving and opposing affidavits, but also inferred certain facts which he attributed to petitioner in violation of the well-settled principles involving motions for summary judgment. To allow the District Court to grant a motion for summary judgment based on entries from medical records without the opportunity for petitioner to cross-examine the defendant-treating physician is a violation of one of the cardinal principles upon which our judicial system is based, to-wit: that trials should be on the merits and not based on unsworn medical records.

To allow a ruling such as this to stand is analogous to the story of the captain's log in which the first mate made the entry "that the captain was not drunk today."

Both the District Court and the United States Court of Appeals did not pass on an issue which has been presented and which holds that the statute of limitations with regard

to medical malpractice actions is tolled while the patient remains under exclusive treatment of the defendants. In *Kossick v. United States* (2nd Cir. 1964) 330 F.2d 933, the Court of Appeals for the Second Circuit held that during a patient's continuous treatment by the allegedly negligent doctor, the limitation period does not commence to run. This view has been followed in *Accardi v. United States* (S.D.N.Y. 1973) 356 Fed.Supp. 218.

Such a rule should be applied to the petitioner in light of the fact that petitioner had been treated exclusively with regard to her nasal problems by Dr. Kauth, the allegedly negligent physician, and was at no time advised by him of the reason for the recommendation of future surgery.

Finally, under the reasoning of *Hungerford* and *Hanna*, it is clear that where a triable of fact exists as to the time of discovery of the medical negligence, summary judgment is improper. According to the declarations filed and considered by the District Court, petitioner alleged that she did not discover that her breathing problems were the result of the negligence of the defendant-physicians until she was examined on March 19, 1974, by Dr. Sherman, a private physician. Defendants, without filing any declaration of the treating physician, Dr. Kauth, alluded to entries in the medical records that Dr. Kauth advised Mrs. Strom that a new and different operation was necessary in March of 1973. Therefore, there existed a disputed issue of fact as to the time when petitioner discovered the medical negligence of defendants and the District Court and the granting of the summary judgment was improper.

V

ARGUMENT

A. IN DETERMINING WHETHER A MOTION FOR SUMMARY JUDGMENT IS PROPER, THE COURT CANNOT WEIGH EVIDENCE AND MUST, IF IT DRAWS INFERENCES FROM THE EVIDENCE PRESENTED, FIND IN FAVOR OF THE PARTY OPPOSING THE MOTION FOR SUMMARY JUDGMENT

This is an action brought by petitioner, Sophia T. Strom, pursuant to the Federal Torts Claims Act, 28 U.S.C. Section 2671, *et seq.*, for medical malpractice as a result of the rhinoplasty operation performed by the physicians at the United States Public Health Service Hospital in San Francisco, California, on June 21, 1971. From the time of the operation on June 21, 1981, petitioner was under the exclusive care and treatment concerning her nasal problems by Dr. James Kauth, the physician who performed the rhinoplasty operation.

On March 19, 1974, after being urged by Dr. Kauth to have a new and different operation performed on her nose, petitioner consulted Dr. Allen Sherman, a private physician in San Francisco, California. At the time of the consultation with Dr. Sherman, petitioner was advised that the deviated septum which was causing her breathing problems, was caused by the operation performed on June 21, 1971.

On Mareh 10, 1976, petitioner filed her claim against the United States of America, the United States Public Health Service Hospital, Drs. James Kauth and Edward Falces.

On December 3, 1976, appellant, representing herself, in propria persona, filed her complaint for medical malpractice in the United States District Court for the Northern District of California. On November 10, 1977, a Substitution of Attorneys was filed and for the first time petitioner was represented by counsel.

On March 13, 1978, petitioner filed her amended complaint for medical malpractice, alleging negligence in the rhinoplasty operation performed on June 21, 1971, and further alleging that she did not discover that said treatment had been negligently performed until March 19, 1974. On May 3, 1978, the defendant United States of America noticed the taking of the deposition of petitioner for May 9, 1978. On June 29, 1978, petitioner's deposition was transcribed and delivered to her. On July 21, 1978, defendants filed a motion for summary judgment on the grounds that petitioner's claim was barred for failing to timely file a claim against the United States of America pursuant to 28 U.S.C. Section 2401(b).

On August 8, 1978, appellant filed a memorandum of points and authorities and declarations in opposition to said motion for summary judgment.

On August 11, 1978, United States District Court Judge Samuel Conti issued an order granting the Government's motion for summary judgment on the ground that the claim of petitioner was not filed within the two-year period after the claim accrued under the Federal Tort Claims Act.

It has long been held that the summary judgment motion is one which should only be granted on undisputed facts and the rendering of the judgment is a matter of law. In

Poller v. Columbia Broadcasting Systems, Inc. (1962) 368 U.S. 464, 7 L.ed. 2d 458, 82 S.Ct. 486, this Court stated:

> "We believe that summary procedure should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be apprised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even-handed justice'."

Petitioner's case is a classic example of trial by affidavit which cannot be tolerated in a society based on trial by jury. To allow a motion for summary judgment to be granted based strictly on the unsworn medical records of a physician who treated petitioner who did not have an opportunity to cross-examine the physician under oath, is clearly not a case of even-handed justice.

The granting of the summary judgment in this case reminds one of the oft-told story of the captain's log. The first mate enters the captain's quarters and obtains the log and therein writes "the captain was not drunk today." One can draw at least two inferences from the notation entered by the first mate.

In the *United States v. Western Electric Company* (9th Cir. 1964) 409 F.2d 1377, the Court of Appeals for the Ninth Circuit reversed a judgment based on the granting of Government's motion for summary judgment on the ground that the trial court erred in weighing the evidence and

resolving the issues rather than determining that there were issues to be resolved at trial. The Court stated:

> "Although the summary judgment rule does not state any different requirement for opposing affidavits, the movant's affidavits the papers supporting the movant will be closely scrutinized whereas the opponent's will be indulgently treated."

This view was followed in *Hanna v. United States Veterans' Administration Hospital, supra,* a medical malpractice action. The Court of Appeals for the Third Circuit reversed the District Court's order granting the Government's motion to dismiss on the grounds that the suit was barred by the two-year statute of limitations. The Court of Appeals held that the trial court had erred in resolving a disputed factual issue, had seized upon date within the limitations period and coupled it with other testimony and concluded that the plaintiff knew, or should have known, his condition was caused by the defendants' negligence.

Further, it is established law that in regard to motions for summary judgment pursuant to the Federal Rules of Civil Procedure that if a choice of inferences are to be drawn from the subsidiary facts contained in the affidavits, exhibits and depositions, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc., supra.*

This view has also been followed in cases involving medical malpractice claims against the United States. In *Goodman v. Mead, Johnson & Company, supra,* the Court of Appeals stated:

> "Inferences to be drawn from the underlying facts contained in evidentiary sources must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and when these assertions conflict with those of the moveant, the former must receive the benefit of the doubt."

It is obvious from a review of the order of the trial court that the Court weighed the evidence. At page 125, the Court stated:

> "It is not disputed that plaintiff had breathing difficulties that developed soon after the operation in 1971, that Dr. Kauth diagnosed a deviated septum in March and May of 1973 and recommended surgery to correct the condition and that Dr. Sherman in 1974 diagnosed a deviated septum. In view of plaintiff's possession of this inform...ion from Dr. Kauth and its nature concerning plaintiff's nose, the Court concludes that plaintiff was put on notice as early as March 1973 that 'there may have been negligence relating to the grievance' made in this action and through the exercise of reasonable diligence plaintiff should have discovered the acts constituting malpractice."

It is also quite obvious that the trial court drew every inference possible against petitioner to eliminate her claim for malpractice in derogation of the rules that opponent's declarations and affidavits are to be liberally construed. This is obvious from the portion of the Court's order at page 125, lines 11 through 19, in which the Court stated:

> "Plaintiff may have arguably been misled by Dr. Kauth into believing her breathing problem would 'resolve itself' and therefore not require her to bring suit dur-

ing that period. *Exnicious v. United States* (10 Cir. 1977) 563 F.2d 418. However, when it continued for nearly two years in which time Dr. Kauth advised that an operation for a deviated septum should be undertaken, at that time plaintiff was apprised of sufficient facts to alert a reasonable person that there may have been negligence in the original operation in 1971."

One would be led to believe that petitioner, a naturalized U. S. citizen of Denmark should be imputed the knowledge of an ear, nose and throat specialist.

This cannot be the type of inferences that can be drawn when dealing with parties of disparity in knowledge, education and resources.

The Court should, therefore, reverse the judgment of the Court of Appeals for the Ninth Circuit and remand this matter to the United States District Court for the Northern District of California for trial on the merits.

B. THE RULE OF KOSSICK V. UNITED STATES SHOULD BE APPLIED TO THE CASE AT BAR IN REVERSING THE JUDGMENT OF THE TRIAL COURT AND COURT OF APPEALS

In *Kossick v. United States* (2nd Cir. 1964) 330 F.2d 933, the Court of Appeals for the Second Circuit held that the statute of limitations regarding claims made for medical malpractice under the Federal Tort Claims Act are tolled as long as the patient/physician relationship continues. This case has been followed by the New York District Court in *Accardi v. United States* (S.D. N.Y. 1973) 356 F. Supp. 218. This rule is apparently founded on the basis that read into every federal statute of limitations is

an equitable doctrine that if facts are concealed from the claimant, the time does not begin to run.

In *Fitzgerald v. Seamans* (3rd Cir. 1977) 553 F.2d 220, the Court stated:

> "Read into every federal statute of limitations, including the adoption of an analogous local statute of limitations, is the equitable doctrine that any case of the defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit."

Petitioner was continuously and exclusively under the care and treatment of Dr. Kauth with regard to her nasal problems from the time of the operation on June 21, 1971, until March 14, 1974, when she sought consultation with Dr. Allen Sherman. During the period she was not treated by any other outside physicians. Based on the equitable principles involved in cases asserting the statute of limitations, this Court should hold that the rule applied in *Kossick, supra*, should be applied and the judgment reversed.

C. FEDERAL LAW REQUIRES THAT A MOTION FOR SUMMARY JUDGMENT MAY NOT BE GRANTED WHERE A TRIABLE ISSUE OF FACT IS PRESENTED TO THE COURT

Federal Rule of Civil Procedure 56(e) provides as follows:

> "(e) Motion and proceedings thereon. The motion shall be served at least ten days before the time fixed for hearing. The adverse party prior to the date of

hearing may service opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in nature, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages."

In *Carr v. The City of Anchorage* (9th Cir. 1957) 243 F.2d 482, the Court of Appeal stated:

"Where pleadings and affidavits raise certain disputed questions of fact, they must all be resolved in favor of appellants for the purpose of considering the motion for summary judgment and the appeal therefrom. This is true because a motion for summary judgment is improper where there is left unresolved a genuine issue as to any material fact. Rule 56(e) Federal Rules of Civil Procedure."

N. L. R. B. v. Smith Industries, Inc. (5th Cir. 1968) 403 F.2d 889, the Court of Appeal stated:

"While a party may not avoid a summary judgment merely by denying the opponent's allegations, *Erickson v. U. S.* (5th Cir. 1965) 395 F.2d 512, it should 'be granted only . . . where it is quite clear what the truth is.' *National Screen Service Corporation v. Poster Exchange, Inc.* (5th Cir. 1962) 305 F.2d 647."

In motion for summary judgment, there is clearly no way in which the Court could ascertain the truth of the allegations of defendants without allowing the deposition of defendant, Dr. Kauth, to be taken. Rather than denying

the motion for summary judgment without prejudice to later renewal after further discovery had been completed, the Court merely drew all inferences against petitioner and rendered the judgment according to its own feelings. Such abuse and avoidance of trials on the merits should not be countenanced.

In the case at bar the petitioner Sophia T. Strom's complaint alleged that she did not discover that the defendant's treatment had been negligent until March 19, 1974. In her affidavit in opposition to the motion for summary judgment, she alleged that she did not discover that the deviated septum was caused by the operation performed at the Public Health Service Hospital until March 19, 1974.

The points and authorities in support of the motion for summary judgment made by the defendants only aver to the fact that defendant, Dr. Kauth, advised her that she had a deviated septum in March of 1973. Nowhere in the defendant's moving papers is it alleged that Dr. Kauth advised petitioner that the deviation was caused by the operation performed on June 21, 1971.

Therefore, there appears to be a disputed issue of fact as to the time when petitioner, Sophia T. Strom, discovered that her problems were caused by the operation on June 21, 1971, and under the well-settled principles involving motions for summary judgment, a triable issue of fact exists as to the time of discovery. Such an issue should be determined by a trial or a motion for summary judgment after petitioner had had the opportunity to examine the defendant, Dr. Kauth.

The Court should, therefore, reverse the judgment of the Court of Appeals and District Court and remand this matter for further proceedings.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the District Court and that of the Court of Appeals should be reversed and the case remanded with instructions that defendants file an answer to the amended complaint forthwith.

Dated: June , 1981.

Respectfully submitted,

MALCOLM L. MCPHEE
Attorney for Petitioner

(Appendix follows)

Appendix

In the United States Court of Appeals
For the Ninth Circuit

No. 78-3417
D.C. No. C 76-2704 SC

Sophia T. Strom,
Plaintiff-Appellant,

v.

United States of America, United States Public Health Service, James Kauth, M.D., Edward Falces, M.D., Does One through Twenty, inclusive,
Defendants-Appellees.

[Filed April 3, 1981]

MEMORANDUM

Appeal from the United States District Court
For the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted July 8, 1980

Before: ANDERSON and TANG, Circuit Judges, and CRAIG,* District Judge.

Pursuant to 28 U.S.C. § 2401(b), a tort claim against the United States must be brought within two years after the claim accrues. A claim accrues under § 2401(b) when the

*The Honorable Walter Early Craig, Senior District Judge for the District of Arizona, sitting by designation.

plaintiff learns of the existence and cause of the injury, *United States v. Kubrick*, 444 U.S. 111, 62 L.Ed.2d 259, 100 S.Ct. 352 (1980), or in the exercise of reasonable diligence should have learned of the existence and cause of the injury. *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962), *overruled on other grounds, Ramirez v. United States*, 567 F.2d 854, 857 (9th Cir. 1977) (en banc). An accrual of a claim need not "await awareness by the plaintiff that his injury was negligently inflicted." *United States v. Kubrick*, 444 U.S. at 123.

Rhinoplasty surgery was performed on appellant on June 21, 1971 at the United States Public Health Service Hospital in San Francisco. After the surgery, breathing difficulties developed, but she was told by her treating physician, Dr. Kauth, that her breathing problems were a normal consequence of the operation and that in time it would clear up. However, in March of 1973, Dr. Kauth diagnosed that appellant's breathing problems were being caused by a "deviated upper septum." The appellant's medical records indicate that appellant was informed of this diagnosis by Dr. Kauth, and was advised by him to undergo additional surgery to correct the deviated septum. Appellant, however, declined to have another surgery at that time.

On March 19, 1974, appellant consulted a private physician, Dr. Sherman, who advised appellant that her deviated septum had been caused by the rhinoplasty operation. Appellant's complaint was subsequently filed on March 10, 1976.

The district court granted summary judgment to the United States because it found that the appellant's claim was time barred. Appellant contends that her complaint should not be deemed time barred because her claim did not accrue until March 19, 1974 when she consulted Dr. Sherman. Therefore, she argues that her complaint which was filed on March 10, 1976 was timely filed. In any event, appellant argues that the granting of a summary judgment was inappropriate in this instance because there is a question as to when appellant discovered that her problems were caused by the operation.

In a motion for summary judgment, the burden is on the moving party to demonstrate that no genuine issue of material fact exists, *California Pacific Bank v. Small Business Administration*, 557 F.2d 218, 220 (9th Cir. 1977), and that, as a matter of law, he is entitled to judgment. *Scandinavian Airlines v. United Aircraft*, 601 F.2d 425, 427 (9th Cir. 1979).

Here, defendants demonstrated that by March of 1973 appellant knew that her breathing problems were not associated with the normal consequences of her operation, but rather were the result of a deviated upper septum. Appellant testified in her deposition that prior to surgery she had not had any breathing difficulties except for sneezing due to her allergy. She also testified that during the operation she heard one of the doctors call out, "You're cutting too much."

Appellant argues, however, that while she was informed that her breathing problems were due to a deviated septum, she was not told that the condition had arisen as a result

of the operation. Thus she contends that the cause of her injuries was not known to her until March of 1974 when Dr. Sherman informed her that the rhinoplasty operation had probably caused the deviated septum.

We agree with appellant that at the time she was informed by Dr. Kauth that her breathing problems were due to a deviated septum, it cannot be said that she knew that her injury had been caused by the operation. Her medical records indicate that she was diagnosed, prior to the operation, as not having a deviated septum. But, there has been no showing that appellant was aware of this information. There is no indication that appellant knew that the deviated septum had been caused by the operation or by natural causes.

However, even though appellant may not have known that the operation had caused the deviated septum, we believe the same facts were sufficient to put appellant on notice that her injuries may have been caused by the operation. Her deviated septum and breathing problems are one and the same—the injury that resulted from the operation. She had not had breathing problems prior to her operation. She had been informed by Dr. Kauth that her breathing difficulties were not associated with the normal consequences of the operation, but rather were due to a deviated septum and that another operation might be needed to alleviate the problem. During the rhinoplasty operation, she heard one of the doctors call out, "You're cutting too much." Though she may not have actually known that the operation had caused her injuries, through reasonable diligence she should have learned that her in-

juries had been caused by the operation. She had enough information so that, as a matter of law, her cause of action began to accrue from March of 1973. Her complaint which was filed in March of 1976 was beyond the two-year limitations period and therefore untimely.

The judgment of the district court is

AFFIRMED.

SOPHIA T. STROM v. UNITED STATES OF AMERICA, No. 78-3417

TANG, Circuit Judge

[Filed April 3, 1981]

I respectfully dissent for the same reasons expressed in my dissent in *Davis v. United States*, No. 77-1942 (9th Cir. ....., 1981). The major issue is whether the district court erred in granting summary judgment in favor of the Government because the statute of limitations had run. The critical question is whether the record presents a genuine issue of material fact concerning the date the claim "accrued". Applying the *Kubrick* rule, I find the district court mischaracterized the evidence to find no disputed material facts.

In *Kubrick*, the plaintiff had surgery in April and developed a hearing loss in mid-June. In succeeding months, he consulted several specialists who diagnosed his malady as "bilateral nerve disease." Finally, in January (some 7 months after injury), a doctor told Kubrick that it was "highly possible" that a treatment administered after surgery *caused* his deafness. At that point, the court held, Kubrick knew of his injury and its cause, and the statute began to run.

In holding that the cause of action accrued when Kubrick was told the *cause* of his nerve disease, the court plainly held that the statute begins to run only when a plaintiff is "armed with the facts about the harm done to him . . ." 444 U.S. at 123. In other words, the plaintiff must be in "possession of the critical facts that he has

been hurt and *who has inflicted the injury*" because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122 (emphasis added).

Here, Strom had rhinoplasty surgery in 1971. Thereafter she experienced breathing problems and was advised by Dr. Kauth, her treating physician, that such discomfort was normal and would take time to correct itself. On March 18, 1973, Dr. Kauth diagnosed Strom's breathing problems as a "deviated septum" and suggested additional surgery. Still struggling to find out what *caused* the deviated septum (just as Kubrick had sought the cause of his nerve disease), Strom consulted a private physician, Dr. Sherman, on March 15, 1974. Strom was then advised for the first time that the 1971 operation caused the deviated septum. Only at that point was she "armed with the facts about the harm" done to her, and thus on notice that negligence, as opposed to natural forces, was possibly involved.

As I see it, then, the analytical flaw in both the district court's order and the majority memorandum is equating a diagnosis (deviated septum) with the cause of injury. In essence, breathing problems and a deviated septum are one and the same injury; the *cause* of that injury was surgical treatment, just as it was in *Kubrick*.

In sum, I would reverse the summary judgment because, at the least, the question when Strom knew (1) of her injury (deviated septum) and (2) its cause (surgical treatment—whether negligent or not) should be a factual determination for the jury. Such a result is justified

because the government, as the moving party, has failed to carry its burden of demonstrating the absence of a genuine issue of material fact. *See also Marshall v. Kimberly-Clark Corp.*, 625 F.2d 1300, 1302 (5th Cir. 1980) ("A dispute over the facts surrounding the date the statute of limitations began 'would alone warrant denial of the motion for summary judgment.'"); *see generally Yazzie v. Olney, Levy, Kaplan & Tenner*, 593 F.2d 100, 103 (9th Cir. 1979).

/s/ THOMAS TANG

United States Circuit Judge